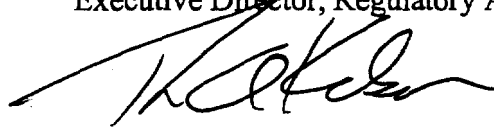


September 24, 1999  
Page 3

Thus, there is no basis for reconsidering, rehearing, or otherwise disturbing the Commission's order in this matter.

Respectfully submitted,

Gene DeJordy  
Executive Director, Regulatory Affairs

A handwritten signature in black ink, appearing to read 'T. Kelsch', written over a horizontal line.

Thomas D. Kelsch, Local Counsel  
Western Wireless Corp.

ccs: Commissioner Susan Wefald  
Commissioner Bruce Hagen  
Commissioner Leo Reinbold  
Illona Jeffcoat-Sacco  
Michael J. Maus, Attorney for Consolidated  
Jan M. Sebby, Attorney for Consolidated

9/14/99

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Western Wireless Corporation vs.  
Consolidated Telephone Cooperative, Inc.  
Complaint**

**Case No. PU-1564-99-17**

**CONSOLIDATED TELEPHONE COOPERATIVE'S  
PETITION FOR RECONSIDERATION**

Pursuant to provisions of N.D.C.C. 28-32-14, Consolidated Telephone Cooperative (Consolidated) petitions the North Dakota Public Service Commission (Commission) for reconsideration of its Order made on August 31, 1999, dismissing Consolidated's counterclaim against Western Wireless Corporation (Western). Consolidated also requests a rehearing.

**GROUND'S FOR RECONSIDERATION**

The specific grounds upon which relief is requested are:

1. The order is not in accordance with the law. Conclusion of Law No. 3, that "North Dakota is federally preempted from rate and entry regulation of Western's Wireless Residential Service, as provided in 47 U.S.C. § 332(c)(3)(A)." is erroneous, under authoritative principles of statutory interpretation affecting the issue of federal preemption of state jurisdiction. The related conclusion listed as Finding of Fact No. 39, that "As a mobile service WRS is exempt from state entry regulation" is also erroneous under authoritative principles of statutory interpretation.
2. Finding of Fact No. 38, that "... WRS has mobile capabilities and is therefor a mobile service," is erroneous under the preponderant evidence, controlling statutes and under authoritative principles of statutory interpretation.

**FURTHER SHOWING ON REHEARING**

On rehearing, a further showing would be made that WRS is not a "mobile service," as that term is defined by the controlling statute and under authoritative principles of statutory interpretation.

## ARGUMENT IN SUPPORT OF PETITION

State jurisdiction over telecommunications exists unless federal authorities have taken preemptory action. By act of Congress, "commercial mobile service" in telecommunications is not subject to state regulation. 47 U.S.C. §§ 253 and 332. No federal law, no act of Congress and no agency rule preempts states' jurisdiction over wireless telephony to stations that are not mobile. The key word is "mobile." That key word is defined by act of Congress, 47 U.S.C. §153 (27) and (28):

"The term 'mobile station' means a radio-communications station capable of being moved and which ordinarily does move."

The telecommunications service involved in this case is described and marketed by Western as "wireless residential service," in competition with local exchange service available to the same residential locations. Surely the word "residential" - adopted by Western and accepted by the Commission to describe the service involved in this case - denotes service to fixed, immobile stations. The evidence supports that ordinary meaning of the word "residential." Wireless residential service is provided with equipment that fits a residential setting - AC power and standard desktop telephone sets plus a Tellular device to transmit and receive radiotelephone transmissions. "Battery power provides mobility that allows customers to operate wire-line telephones in a cellular fashion from a vehicle, other building, or outdoors . . . even though . . . the Tellular unit is heavy and awkward compared to hand-held wireless phones and must be connected to a traditional telephone set. There are no handles or other conveniences that would indicate the unit was designed or intended for mobile use." Findings of Fact Nos. 33 and 34. Despite these fixed non-mobile characteristics of wireless residential service, the Commission found . . . WRS has mobile capabilities and is therefore a mobile service" and "as a mobile service, WRS is exempt from state entry regulation." Findings of Fact Nos. 38 and 39.

Congress has defined a mobile station as a wireless telecommunications station that is "capable of being moved and which ordinarily does move." 47 U.S.C. § 153(28). This definition is statutory law enacted by Congress and prevails over any definition adopted by any agency, including the FCC. Despite this uncomplicated definition containing two elements, the Commission apparently deems itself constrained by some statements (not formally adopted rules) of the FCC that lead the Commission to declare that "WRS has mobile capabilities and is therefore a mobile service." What happened to the "ordinarily does move" element of the statutory definition? How can it be that the FCC or the ND PSC disregards the ordinary meaning of the words of the controlling statute: "and" and "ordinarily does move"?

In a supplemental brief addressing questions asked by the Commission in its May 14, 1999, letter to the parties' counsel, Consolidated referred the Commission to the United States Supreme Court precedent that established the principles and process of analysis to determine whether federal action (by Congress or an authorized agency) has the effect to preempt states' action affecting the same subject. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 106 S. Ct. 1890 (1986). In Louisiana, as in this case, the central issue was whether FCC action under the Communications Act has the purpose and effect to preempt state jurisdiction - state jurisdiction that unquestionably exists unless federal authorities have taken preemptory action.

In its August 31 decision in this case, the Commission did not correctly apply Louisiana analysis to the preemption issue. As stated in the Louisiana decision, there are several ways ("varieties") by which federal action might preempt states from acting in the same subject area, always guided by the foundation principle:

"The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." 106 S. Ct. at 1899.

As explained by the Court in Louisiana, "Pre-emption occurs

- [1] when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law,
- [2] when there is outright conflict between federal and state law,
- [3] where compliance with both federal and state law is in effect physically impossible,
- [4] where there is implicit in federal law a barrier to state regulation,
- [5] where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or
- [6] where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.
- [7] Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation . . . . [But] only when and if it is acting within the scope of its congressionally delegated authority."

106 S. Ct. at 1898 and 1901. (Citations omitted; numbered brackets added for convenience; underscoring added for emphasis.)

Even though the Commission did not cite Louisiana, it is evident from the language in the August 31 decision that the Commission concluded that "North Dakota is federally preempted from rate and entry regulation of Western's Wireless Residential Service . . . ." (Conclusion of Law No. 3) as if the Commission had deliberated under preemption type 7. The Commission did not conclude that it is federally preempted under any of preemption types one through six. Given the system of dual federal and state regulation of telecommunications, there is no purpose in extended discussion about the inapplicability of preemption types 2 through 6. And given the Commission's reliance on type 7 preemption by FCC action, there is no purpose in extended discussion about type 1 preemption based solely on words of the acts of Congress.

The Commission's preemption Conclusion of Law (No. 3) and the related ultimate Finding of Fact (No. 38) that ". . . WRS [wireless residential service] has mobile capabilities and is therefore a mobile service" are erroneously based on the FCC's statements in two reports and orders affecting permissible uses of licensed wireless telephone spectrum, cited in Findings of Fact Nos. 35 and 36.

If the Commission had adapted the words of the Louisiana decision to articulate its type 7 decision, it might have said: "North Dakota is federally preempted from rate and entry regulation of Western's Wireless Residential Service not as a result of action taken by Congress itself but by the FCC acting within the scope of its congressionally delegated authority." But, regardless of the words used to declare the Commission's decision that North Dakota is federally preempted by type 7 action, that decision is simply and plainly erroneous for the single and simple reason that the FCC has not acted to preempt state regulation!

The so-called "CMRS Flexibility Order" (cited by the Commission in Finding No. 36) is the closest thing to "action" by the FCC addressing the type 7 preemption issue, whether state jurisdiction has been preempted by the FCC acting within the scope of its congressionally-delegated authority under the Communications Act. To paraphrase the words of the Louisiana decision, preemption has not occurred, because of the absence of a clear expression by Congress. Neither has preemption occurred as a result of the FCC acting within the scope of its congressionally-delegated authority - because the FCC has not acted at all on the specific issue of wireless residential service. In the Flexibility Order, the FCC specifically abstained from acting to preempt state regulation of wireless residential service. First Report and Order and Further Notice of Proposed Rulemaking, June 27, 1996, WT Docket No. 96-6 FCC 96-283. Type 7 preemption has not occurred because the federal agency has not taken any preemptive action on this issue.

There is no denying the 1996 FCC's Flexibility Order signaled its leaning towards action to claim preemptive authority, excluding states' jurisdiction (consistent with the federal agency's long-standing record of assaults on states' jurisdiction over intrastate telecommunications by any technology). But the FCC's proposal of rules is not the legal equivalent of the adoption of rules to preempt states' jurisdiction. If there is no type 1 preemption because there is no clear congressional expression, then there can be no type 7 preemption rule where the related federal agency has not clearly exercised delegated power to preempt state jurisdiction.

If the FCC's 1996 Flexibility Order and Notice of Proposed Rulemaking is to have any effect on the Commission's disposition of this case, the Commission's decision should not be "we regard the FCC as having acted to preempt state authority." On the contrary, in fulfillment of its responsibilities to North Dakota, the Commission's position should be: "After three years of not acting on its proposed rules, we acknowledge the FCC has not acted to preempt state jurisdiction to regulate wireless residential service. Type 7 preemption has not occurred."

Even if the "CMRS Flexibility Order" had been enacted rather than merely proposed - indeed, even if the FCC had intervened or participated in this case on an amicus basis to make such a claim - even in those circumstance the Commission should perform its duty to enforce North Dakota law and reject any preemption claim as an overreaching of the FCC's authority under applicable federal statutes and court precedents.

As stated in the Louisiana case, type 7 preemption occurs only when and if the federal agency is acting within the scope of its congressionally delegated authority. "An agency may not confer power on itself." Louisiana, 106 S. Ct. 1901. As reiterated in the Court's 1999 decision affecting the 1996 Act, the important distinction is whether the FCC has explicit rulemaking authority given to it by Congress. A.T. & T. v. Iowa Utilities Board, 119 U.S. 721, n. 7 (1999). Where agency action does not conform to the plain meaning of a statute, or where an agency's construction of a statute is arbitrary, capricious or manifestly contrary to the statute, the agency interpretation will not be sustained. Chevron, U.S.A., Inc. v. Natural Resources Defense, 467 U.S. 837, 104 S. Ct. 2778 (1984); Texas Office of Public Utility Counsel, et al. v. Federal Communications Commission (5<sup>th</sup> Cir. July 30, 1999, in Case No. 97-60421).

The Commission's decision in this case, and the FCC's "CMRS Flexibility Order" on which the PSC relies, both ignore the statute's words "and" and "ordinarily does move." This agency action - by the FCC or by the Commission - both fail to conform to authoritative principles of statutory interpretation affecting the issue of federal preemption of state jurisdiction.

## **CONCLUSION**

The essence of the North Dakota Commission's decision in this case is "... WRS has mobile capabilities and is therefore a mobile service" and "as a mobile service, WRS is exempt from state entry regulation." Findings of Fact Nos. 38 and 39. The Commission has entirely ignored the additional component of the statutory definition "and which ordinarily does move."

Apparently the Commission reached its decision in reliance on the FCC's "CMRS Flexibility Order" and related proposed rules. But the FCC has not acted to preempt state jurisdiction. The FCC's proposal of rules is not the legal equivalent of the adoption of rules to preempt states' jurisdiction. Even if the proposed rules were adopted, the FCC may not confer on itself the power to ignore the plain meaning of the statutory words "ordinarily does move." The Commission is not obliged to follow the FCC's proposed rules that ignore the plain meaning of the statute enacted by Congress.

State jurisdiction unquestionably exists under N.D.C.C. § 49-03.1 unless federal authorities have taken preemptory action. The Commission should not surrender or abandon the state's jurisdiction in the absence of federal preemptive action.

State regulation of wireless telephone service is preempted only if the service is mobile service, and only if the service is provided to instruments that are capable of moving and that ordinarily do move. In the absence of a finding, supported by evidence, that wireless residential service is not only "capable of being moved" but also "ordinarily does move," the Commission's Conclusion of Law No. 3 that "North Dakota is federally preempted from rate and entry regulation of Western's Wireless Service" is erroneous and should be corrected by the Commission on reconsideration.

The Commission should deny Western's motion to dismiss Consolidated's counterclaim, and should grant Consolidated's request for relief that Western Wireless be ordered to cease and desist, under N.D.C.C. § 49-03.1-08. Alternatively, the Commission should schedule a rehearing to address the factual issue whether wireless residential service "ordinarily does move."

Dated this 14<sup>th</sup> day of September, 1999.

HARDY, MAUS & NORDSVEN

By 

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Consolidated Telephone Cooperative's  
Petition for Reconsideration was on the 14<sup>th</sup> day of September, 1999, mailed to:

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Michael J. Maus



**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Western Wireless Corporation vs.  
Consolidated Telephone Cooperative, Inc.  
Complaint**

**Case No. PU-1564-99-17**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

**August 31, 1999**

**Appearances**

Commissioners Bruce Hagen, Susan E. Wefald and Leo M. Reinbold.

Gene DeJordy, Executive Director-Regulatory Affairs, Western Wireless Corporation, 3650 111<sup>th</sup> Avenue SE, #400, Bellevue, Washington 98006 on behalf of Western Wireless Corporation.

Thomas D. Kelsch of Kelsch Kelsch Ruff & Kranda PLLP, Attorneys at Law, P. O. Box 1266, Mandan, North Dakota 58554-7266 on behalf of Western Wireless Corporation.

Michael J. Maus of Howe, Hardy, Galloway & Maus, P.C., Attorneys at Law, 137 First Avenue West, P. O. Box 370, Dickinson, North Dakota 58602-0370 on behalf of Consolidated Telephone Cooperative, Inc.

Jan M. Sebby of Pringle & Herigstad, P.C., Attorneys at Law, P. O. Box 1000, Minot, North Dakota 58702-1000

Charles E. Johnson, Commerce Counsel, Public Service Commission, State Capitol, 600 East Boulevard Avenue, Bismarck, North Dakota 58505 on behalf of the Public Service Commission.

William W. Binek, Commerce Counsel, Public Service Commission, State Capitol, 600 East Boulevard Avenue, Bismarck, North Dakota 58505 as Hearing Officer.

**Preliminary Statement**

On January 15, 1999, Western Wireless Corporation (Western) filed a complaint with the Public Service Commission against Consolidated Telephone Cooperative, Inc.

(Consolidated). Western alleges that Consolidated discontinued service to Western with the intent of preventing Western from providing telecommunications service in competition with Consolidated in violation of N.D.C.C. §§ 49-21-07, 49-21-09, and 49-21-10; N.D. Admin. Code § 69-09-05-02; 47 U.S.C. §§ 251(a)(1) and 251(b)(3); and 47 C.F.R. § 51.217(c)(1).

Included with the complaint was an Expedited Motion for Preliminary Injunction, requesting the Commission issue an expedited order requiring Consolidated to immediately restore service to Western.

On January 20, 1999, the Commission found that the complaint stated a *prima facie* case and moved to serve the complaint on Consolidated. Also on January 20, 1999, the Commission issued a Notice of Hearing, which was revised on January 21, 1999, scheduling a public hearing for March 10, 1999 for the purpose of considering the allegations in the complaint.

On January 25, 1999, Consolidated filed an offer to restore service for Western's cellular customers who are not Wireless Residential Service (WRS) customers.

On February 9, 1999, Consolidated filed its Answer and Counterclaim, admitting it discontinued service to Western on January 11 and stating that the service was reconnected on February 1, 1999. Consolidated denied that its actions were unlawful. In its counterclaim, Consolidated alleges that Western engaged in competitive local exchange carrier activities without proper authority required under N.D.C.C. chapter 49-03.1 and § 49-21-08. Consolidated requests the Commission issue an order requiring Western to cease and desist from providing fixed wireless service in Regent until Western has complied with the law.

On February 15, 1999, Consolidated filed its Response to Motion for Preliminary Injunctive Relief, requesting the Commission deny the motion because service has been restored and the motion is therefore moot.

On March 3, 1999, Western filed its Answer and Motion to Dismiss Counterclaim. Western denied that it engaged in any activities without proper authority and requested the Commission dismiss the counterclaim.

On March 10, 1999, a formal hearing was held as scheduled. On April 23, 1999, the parties filed simultaneous briefs according to a briefing schedule set by the Hearing Officer.

On May 4, 1999, Consolidated filed a copy of a letter to Western requesting agreement to file reply briefs by May 7<sup>th</sup> and on May 7, 1999, Consolidated filed a reply brief. On May 12, 1999, Western filed a motion to strike Consolidated's reply brief because it was not agreed to at the hearing and not included in the briefing schedule set by the Hearing Officer.

On May 11, 1999, the Commission conducted a working session during which it discussed this case and determined it needed additional information from the parties. On May 14, 1999, the Commission sent a letter to the parties requesting the information and the parties filed responses on June 14, 1999.

On July 8, 1999, the Commission conducted a second working session. On July 9, 1999, Consolidated sent a letter to the Commissioners that further discussed issues in the case.

On August 13, 1999, the Commission sent a letter to the parties stating that in order to fairly allow parties to provide any relevant or updated analysis not previously submitted the Commission would accept reply briefs or comments until August 18, 1999. No such reply briefs or comments were received.

On August 19, 1999, The Commission conducted a third working session.

### **Motion to Strike**

At the close of hearing, the Hearing Officer established a schedule for submitting simultaneous post-hearing briefs but was silent regarding the filing of reply briefs. After receiving additional briefs in this and a related case, the Commission provided both parties an opportunity to file reply briefs or comments by August 18, 1999. As a result, both parties have now had ample opportunity to file reply briefs. Therefore, Western's motion to strike the reply brief filed by Consolidated on May 7, 1999 is moot.

### **Findings of Fact**

1. The Complainant, Western Wireless Corporation dba Cellular One (Western), is a provider of wireless telecommunications services to customers in North Dakota under license by the Federal Communications Commission (FCC).
2. The Respondent, Consolidated Telephone Cooperative (Consolidated) is an incumbent local exchange carrier (ILEC) that provides local exchange telephone service to customers in and around the community of Regent, North Dakota.

### **Western's Complaint**

3. Western witness Kim Schmidt, Special Projects Manager, testified that Western contacted Consolidated in August, 1998, about obtaining direct interconnection and Direct Inward Dialing (DID) numbers and these services were provided by Consolidated soon thereafter.

4. On January 7, 1999, Western began offering Wireless Residential Service (WRS) in Regent, North Dakota in competition with the local exchange service provided by Consolidated.

5. On January 11, 1999, Consolidated disconnected six DID trunks and 2,000 telephone numbers that were being used for interconnecting Western's cellular and WRS customers with Consolidated's local exchange service network. The effect of the disconnection was that Western's cellular and WRS customers were unable to receive local calls.

6. Consolidated did not provide any notice to Western or Western's customers prior to discontinuing service.

7. On February 1, 1999, Consolidated restored the service and DID numbers to Western.

### **Violations**

8. Western alleges Consolidated violated N.D. Admin. Code § 69-09-05-02(1) when it discontinued services for which Western has paid in full. Western further alleges that it was disconnected without the disconnect notice required by N.D. Admin. Code § 69-09-05-02(5).

9. The relevant disconnect rule provides:

**69-09-05-02. Discontinuance of telecommunications services.**

A utility may not discontinue telecommunications services, except as provided in this section.

1. A utility may discontinue the essential services it provides:

- a. If the customer is delinquent in payment for essential services, then essential services may be discontinued even though discontinuing the services results in the discontinuance of all telecommunication services.
- b. If the customer is delinquent in payment for long-distance services rendered by a local exchange company or another company and billed by the local exchange company, then the local exchange company may deny the customer all forms of access to the network of the telecommunications company to which the customer is delinquent in payment. However, if, due to technical limitations, a local exchange company must also deny the customer all forms of access to the long-distance networks of all telecommunications companies, including its own, in order to deny the

customer access to the network of the company to which the customer is delinquent, the local exchange company may do so.

5. A utility may not discontinue service to a customer for failure to pay for service until the utility first gives the customer notice of its intention to discontinue such service on account of delinquency. The notice must:
  - a. Be sent by first-class mail addressed to the billing name and address of the affected account.
  - b. Show the amount of the delinquency.
  - c. Include the telephone number of the public service commission.
  - d. Advise the customer of the customer's rights and remedies, including the customer's right to work out a satisfactory deferred installment agreement for delinquent accounts.
  - e. Inform the customer that service will be discontinued if the delinquent account is not paid within ten calendar days from the date of mailing or personal delivery of the notice, or if a satisfactory installment agreement is not made with the utility for payment of the delinquent bill. The utility may discontinue service without further notice if the customer fails to pay the delinquent account by the due date.

N.D. Admin. Code § 69-09-05-02, subsections (1) and (5).

10. Consolidated contends that this rule does not apply and that any duty to continue service is premised upon Western first complying with applicable federal and state laws and regulations.

11. Under the rule, Consolidated may not discontinue service if payment for the service is not delinquent. In addition, if Consolidated believed it had reason to discontinue service to Western, the rule requires Consolidated to first give notice of its intent to disconnect. Consolidated's obligations under N.D. Admin. Code § 69-09-05-02 do not depend on Western's compliance with any other law or rule.

12. The Commission finds that Consolidated violated N.D. Admin. Code § 69-09-05-02 when it discontinued service to Western on six trunks and 2,000 associated DID numbers available or being used for service to Western's cellular and WRS customers.

13. Western alleges that Consolidated's discontinuance of service to Western and Western's customers while continuing to provide service to Consolidated and its customers constitutes a violation of N.D.C.C. § 49-21-07, the prohibition against discrimination.

14. The discrimination prohibition provides:

**49-21-07. Discrimination unlawful.** It shall be unlawful for any telecommunications company to make any unjust or unreasonable discrimination in prices, practices, or service for or in connection with like telecommunications service, or give any undue or unreasonable preference or advantage to any person or telecommunications company or to subject any person or *telecommunications company to any undue or unreasonable prejudice or disadvantage in the service rendered by it to the public or to a telecommunications company*, or to charge or receive for any such service rendered, more or less than the prices provided for in the schedules then on file with the commission. A telecommunications company, including a telecommunications company exempt from one or more provisions of title 49 under section 49-21-02.1 providing intrastate interexchange message toll services shall charge uniform prices on all routes where it offers such services. A telecommunications company providing local exchange service and message toll and private line services shall cover in its price for message toll and private line services, the price of providing access service in its own exchanges. Nothing in this chapter shall be construed to prevent any telecommunications company from offering or providing volume or other discounts based on reasonable business practices; from passing through any state, municipal or local taxes to the specific geographic areas from which the taxes originate; or from furnishing free telecommunications service or service at reduced prices to its officers, agents, servants, or employees. N.D.C.C. § 49-21-07 (emphasis supplied).

15. Consolidated denies that its actions were unlawful or that it made any unjust or unreasonable discrimination and asserts that its actions were justified because of Western's failure to comply with applicable federal and state laws and regulations. Consolidated further contends that N.D.C.C. § 49-21-07 does not apply to Western.

16. Western was a customer of Consolidated at the time of the disconnect. Western, in turn, had customers using the service Western purchased from Consolidated. Consolidated's disconnect subjected Western to *undue or unreasonable prejudice or disadvantage in the service rendered by Western to its customers*. The Commission finds that Consolidated violated N.D.C.C. § 49-21-07 when it discontinued service to Western.

17. Western alleges that discontinuance of services by Consolidated constitutes a violation of N.D.C.C. § 49-21-10.

18. Section 49-21-10 provides:

**49-21-10. Transmitting telecommunications from other telecommunications companies.** Every telecommunications company operating in this state shall *receive, transmit, and deliver, without discrimination or delay, the telecommunications of every other telecommunications company* with which a connection has been made. N.D.C.C. § 49-21-10 (emphasis supplied).

19. Consolidated intentionally ceased transmitting Western's telecommunications. The Commission finds that Consolidated violated N.D.C.C. § 49-21-10 when it discontinued service to Western, thereby failing to receive, transmit, and deliver, without discrimination or delay, the telecommunications of Western.

20. Western alleges that Consolidated's disconnection violates N.D.C.C. § 49-21-09, which obligates Consolidated to interconnect with Western.

21. The interconnection statute provides:

**49-21-09. Telecommunications - Connections.** Whenever a connection can be made reasonably between the facilities of two or more telecommunications companies for the transfer of telecommunications and public convenience and necessity will be subserved thereby, the commission may require that such connection be made and may order that telecommunications be transmitted and transferred by the companies, as provided in this section. When, after notice and hearing in accordance with chapter 28-32, the commission finds that public convenience and necessity require the use by one telecommunications company of facilities or services of another telecommunications company, and that such use will not result in irreparable injury to the owner or other users of such facilities or services, nor any substantial detriment to the facilities or services, and that such telecommunications companies have failed to agree upon such use or the terms and conditions or compensation for the same, the commission, by order, may direct that such use be permitted, and may prescribe reasonable compensation, terms, and conditions. If such use is directed, the telecommunications company to which the use is permitted is liable to the owner or other users of such facilities or services for such damage as may result therefrom to the property of such owner or other users thereof. N.D.C.C. § 49-21-09.

22. The record does not support a finding that Consolidated violated N.D.C.C. § 49-21-09.

23. Western alleges violation of 47 U.S.C. § 251 subsections (a)(1) and (b)(3), and 47 C.F.R. § 51.217(c)(1). Allegations concerning federal rules and statutes should be addressed in the federal jurisdiction.

### **Penalties**

24. Penalties for violations of utility law, rules and orders are provided in N.D.C.C. § 49-07-01.1. It provides:

**49-07-01.1. Violation of statute, commission order, or commission regulation - Assessment of civil penalty.** Any person who violates any statute, commission order, or commission regulation which applies to matters within the authority of the commission under chapters 8-08, 8-09, 8-10, 24-09, and 32-25, titles 60 and 64, and title 49 except for chapter 49-22, shall, in addition to any other penalty provided, be subject to a civil penalty of not to exceed five thousand dollars. The civil penalty may be compromised by the commission. The amount of the penalty when finally determined or agreed upon in compromise, if not paid, may be recovered in a civil action in the courts of this state. N.D.C.C. § 49-07-01.1.

25. The Commission finds that the intentional discontinuance of service to Western, resulting in discontinuance of service to Western's cellular and WRS customers, is a serious matter. Consolidated's actions constituted violation of two North Dakota laws and one Commission rule. Consolidated's actions affected another company, as well as the end-use customers of that company. The Commission finds Consolidated should be assessed a civil penalty of \$15,000.

26. The Commission recognizes that these are the first such violations by Consolidated and that Consolidated did voluntarily restore service. Therefore, the Commission finds that \$13,500 (90%) of the \$15,000 penalty should be suspended on the condition that Consolidated has no further violations during the period ending two years from the date of this Order.

### **Consolidated's Counterclaim**

27. Consolidated alleges in its counterclaim that Western engaged in competitive local exchange carrier activities without proper authority under N.D.C.C. chapter 49-03.1 and § 49-21-08. Consolidated requests the Commission issue an order requiring Western to cease and desist from providing fixed wireless service in Regent until Western has complied with the law.

28. Western moved to dismiss Consolidated's counterclaim on grounds that Western is authorized to provide WRS over its cellular licenses and WRS is a Commercial





Mobile Radio Service (CMRS) exempt from state entry regulation under 47 U.S.C. § 332(c)(3)(A).

29. 47 U.S.C. § 332(c)(3)(A) provides that states are prohibited from entry and rate regulation of mobile services. The statute provides:

(3) State preemption. (A) Notwithstanding sections 2(b) and 221(b) [47 USCS §§ 152(b) and 221(b)], no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that-

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. 47 U.S.C. § 332(c)(3)(A).

30. 47 U.S.C. § 153(27) defines mobile services:

(27) Mobile service. The term "mobile service" means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio

communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding. 47 U.S.C. § 153(27).

31. 47 U.S.C. § 153(28) defines mobile station:

(28) Mobile station. The term "mobile station" means a radio-communication station capable of being moved and which ordinarily does move. 47 U.S.C. § 153(28).

32. 47 C.F.R. § 22.99 contains several definitions, including a further definition of mobile station:

*Mobile station.* One or more transmitters that are capable of operation while in motion. 47 C.F.R. § 22.99

33. Western contends WRS is CMRS because it is provisioned as a hybrid fixed/mobile service. Western witness Schmidt testified that WRS functions like conventional cellular service in that it is associated with a customer rather than a specific location. Instead of using a hand-held phone or bag phone, WRS uses a device that it terms a "Tellular". Schmidt explained that the Tellular device is about the size of a small laptop computer and consists of a standard cellular antenna to transmit and receive signals in the same manner as a hand-held cellular phone. The Tellular is connected to the customer's existing telephone set and operates on either AC or battery power. Battery power provides mobility that allows customers to operate wire-line telephones in a cellular fashion from a vehicle, other building, or outdoors.

34. Consolidated contends that the Tellular unit through which WRS is provisioned is not a mobile station under the statutory definition because it ordinarily does not move. The Tellular unit is heavy and awkward compared to hand-held wireless phones and must be connected to a traditional telephone set. There are no handles or other conveniences that would indicate the unit was designed or intended for mobile use. Consolidated contends that WRS is provisioned as a basic exchange service such that its purpose is to provide basic local exchange service to residences using a radio loop instead of a conventional wire loop.

35. In 1994, the FCC determined that services having both fixed and mobile capabilities fall within the statutory definition of mobile services:

38. We also agree with Rockwell that satellite services provided to or from a transportable platform that cannot move when the communications service is offered should not be included within the definition of mobile service. These fixed services are used to provide disaster relief, temporary communications for news reporters and expeditions, and temporary communications in remote areas and cannot be used in a mobile mode. *Services provided through dual-use equipment, however, such as Inmarsat-M terminals which are capable of transmitting while the platform is moving, are included in the mobile services definition.* We also agree with New York that the substitution of a radio loop for a wire loop in the provision of BETRS does not constitute mobile service for purposes of our definition. As the Commission noted in the BETRS proceeding, n53 this service was intended to be an extension of intrastate basic exchange telephone service. Thus, the radio loop merely takes the place of wire or cable, which in rural and geophysically rugged areas is often prohibitively expensive to install and maintain. Second Report and Order, FCC 94-31, GN Docket No. 93-252, (emphasis supplied).

36. The FCC reaffirmed its 1994 determination in its 1996 CMRS Flexibility Order:

7. The current rules also place some limits on the ability of licensees on CMRS spectrum to offer fixed services, however. *In reviewing the definition of "mobile service" under the Communications Act, "we have concluded that services having both fixed and mobile capabilities, e.g., services provided through dual-use equipment, fall within the statutory definition."* In contrast, we have concluded that services that are solely fixed in nature, e.g., fixed point to point services such as Basic Exchange Telephone Radio Service (BETRS), do not constitute "mobile service" within the meaning of the statute. The current rules do not allow fixed services to be offered on spectrum allocated for PCS or other CMRS unless they are ancillary to or in support of mobile service offerings, or unless the carrier obtains a waiver allowing it to offer primarily fixed service. The rationale for prohibiting non-ancillary fixed uses of the spectrum has been that the amount of spectrum available for the development of new mobile services such as PCS is limited and that alternative spectrum is available for fixed services. First Report and Order and Further Notice of Proposed Rule Making, FCC 96-283, WT Docket No. 96-6, (footnotes omitted, emphasis supplied).

37. Consolidated has not met its burden of proof. The record does not support a finding that WRS is a solely fixed service.

38. The Commission finds WRS has mobile capabilities and is therefore a mobile service.

39. As a mobile service, WRS is exempt from state entry regulation.

### **Conclusions of Law**

1. The Commission has jurisdiction of the parties and of this matter.
2. Consolidated violated N.D.C.C. §§ 49-21-07, 49-21-10 and N.D. Admin. Code § 69-09-05-02 when it discontinued telephone service to Western and its customers on January 11, 1999.
3. North Dakota is federally preempted from rate and entry regulation of Western's Wireless Residential Service, as provided in 47 U.S.C. § 332(c)(3)(A).
4. Any requirement for a certificate of public convenience and necessity under N.D.C.C. chapter 49-03.1 is federally preempted.
5. The counterclaim filed by Consolidated should be dismissed.

### **Order**

The Commission Orders:

1. Consolidated is assessed a penalty of \$15,000, of which \$13,500 is suspended on condition that Consolidated not have any further violations for a period of two years from the date of this Order.
2. Remittance of the \$1,500 penalty that is currently payable shall be made within thirty days of receipt of this Order, payable to the Public Service Commission.
3. Western's motion to dismiss the counterclaim filed by Consolidated on February 9, 1999, is granted and Consolidated's counterclaim is dismissed.
4. Western's motion to strike Consolidated's late filed brief is moot.
5. Western's Motion for Preliminary Injunctive Relief is moot because service has been restored.

### **PUBLIC SERVICE COMMISSION**

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**Susan E. Wefald**  
**Commissioner**

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**Bruce Hagen**  
**President**

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**Leo M. Reinbold**  
**Commissioner**

**Western Wireless Corporation vs.  
Consolidated Telephone Cooperative, Inc.  
Complaint**

**Case No. PU-1564-99-17**

**Fact Sheet**

**Background:**

Western Wireless began offering Wireless Residential Service on January 7, 1999, in Regent ND. Service that Western Wireless purchased from Consolidated Telecommunications Cooperative in order to provide Wireless Residential Service was disconnected without notice by Consolidated on January 11, 1999 and restored on February 1, 1999.

When service was disconnected there were four customers purchasing the Wireless Residential Service. Western reports it now has sixty customers on the service.

Calls from Regent to Mott, New England, Elgin, New Leipzig and Dickinson, among other areas, are included in the price for local service. A list of exchanges included in the local service offering is available from the company.

The cost for local service, including the expanded calling area, is \$14.99 per month.

**History:**

On January 15, 1999, Western filed a Complaint and Expedited Motion for Preliminary Injunction, requesting the Commission require restoration of the service and assess penalties against Consolidated.

On February 9, with its answer to Western's Complaint, Consolidated filed a counterclaim, requesting the Commission issue an order that Western cease and desist from providing the Wireless Residential Service until it obtains a Certificate of Public Convenience and Necessity from the Commission, authorizing Western to provide the service.

On March 10, a formal hearing was held by the Commission.

**Today's Action:**

The Commission will vote whether to adopt a proposed decision assessing a \$15,000 penalty against Consolidated with all but \$1,500 of that amount suspended on condition that Consolidated have no further violations for two years. The proposed decision would dismiss the counterclaim filed by Consolidated on grounds that the Commission is federally preempted from requiring Western to obtain a Certificate of Public Convenience and Necessity before offering Wireless Residential Service.

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1 (The proceedings herein were had and made  
2 of record, commencing at 9:00 a.m., Wednesday,  
3 March 10, 1999, as follows:)  
4 (CTC Exhibit Nos. 1, 2, 3, 4 and 5 were  
5 marked for identification by the reporter.)  
6 MR. BINEK: Good morning. My name is  
7 William Binek. I am the procedural hearing officer  
8 in this proceeding. I'll note for the record that  
9 the date is March 10, 1999, and the time is 9:00  
10 a.m. We are in the Public Service Commissioners  
11 hearing room on the 12th Floor of the State Capitol  
12 Building in Bismarck, North Dakota.  
13 This is the time and place set for hearing  
14 in the case entitled Western Wireless Corporation  
15 versus Consolidated Telephone Cooperative, Inc.,  
16 Complaint, Case No. PU-1564-99-17.  
17 Before I proceed further with this case, I  
18 will call on each of the Public Service  
19 Commissioners for any opening remarks they would  
20 like to offer. First, Commission President Bruce  
21 Hagen. Commission Hagen is also the  
22 telecommunications portfolio holder.  
23 COMMISSIONER HAGEN: Thank you, Bill.  
24 Good morning. Good to see you all here. We know  
25 this is a very important case for all parties and

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1 we're hoping to have the very best record  
2 possible. The Commission has to make a decision on  
3 the legal record, and we'll do our best to make a  
4 good, just decision from that. It's going to get  
5 kind of hot in here so we'll leave the back door  
6 open. I don't know what else we can do. It's just  
7 too small a room for everybody, but bear with us.  
8 Thank you.  
9 MR. BINEK: Commissioner Susan Wefald.  
10 COMMISSIONER WEFALD: Good morning. I  
11 also agree this is a very important case for the  
12 people who are involved in it. It's also an  
13 important case for the State of North Dakota. It  
14 involves decisions about whether a PC&N is going to  
15 be necessary for fixed mobile service. It's also  
16 an important case that people are watching across  
17 the country because it's a precedent-setting case  
18 in some ways, and so we're here to get the best  
19 information we can to make the best decision that  
20 we can. Thank you.  
21 MR. BINEK: Commissioner Leo Reinbold.  
22 COMMISSIONER REINBOLD: Thank you, Mr.  
23 Examiner. And welcome, once again, in addition to  
24 the welcomes by my fellow commissioners. It's  
25 quite obvious that there's a great deal of interest

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1 in this case, this type of case not only statewide,  
2 but literally across the country. There are people  
3 watching and listening as we proceed today and as  
4 long as it takes. Thank you for being here. It's  
5 gratifying to see such interest, and I hope you all  
6 got a parking place within a half a block or so or  
7 half a mile or whatever it might have been. The  
8 legislature is in town, too. And that's why it's  
9 so refreshing to see new people.  
10 COMMISSIONER HAGEN: We do have Senator  
11 Aaron Krauter here I note.  
12 COMMISSIONER REINBOLD: Senator Krauter.  
13 Okay. With one exception.  
14 MR. BINEK: Thank you, Commissioners. On  
15 January 15, 1999, Western Wireless Corporation  
16 filed a complaint with the Public Service  
17 Commission against Consolidated Telephone  
18 Cooperative, Inc. Western Wireless alleges that  
19 Consolidated discontinued service to Western  
20 Wireless with the intent of preventing Western  
21 Wireless from providing telecommunications service  
22 in competition with Consolidated, all in violation  
23 of North Dakota Century Code Sections 49-21-07,  
24 49-21-09 and 49-21-10; North Dakota Administrative  
25 Code Section 69-09-05-02.1; 47 United States Code

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1 Sections 251(a)(1) and 251(b)(3); and 47 Code of  
2 Federal Regulations Section 51.217(c)(1).  
3 Western Wireless requests relief as  
4 follows:  
5 1. For an order requiring Consolidated to  
6 immediately reinstate service to the direct inward  
7 dialing trunk and local telephone numbers in  
8 Regent, North Dakota, previously provided to  
9 Western Wireless;  
10 2. An injunction enjoining respondent  
11 from interfering with any of the direct inward  
12 dialing trunk or local telephone numbers previously  
13 provided to Western Wireless; and  
14 3. For penalties, fines, and forfeitures  
15 in the maximum amount permitted.  
16 Also included with the complaint was an  
17 expedited motion for preliminary injunction  
18 requesting the Commission to issue an expedited  
19 order requiring Consolidated to immediately restore  
20 the DID trunk and local telephone numbers.  
21 On January 20, 1999, the Commission found  
22 that the complaint states a prima facie case and  
23 moved to serve the complaint on Consolidated.  
24 Also on January 20, 1999, the Commission  
25 issued a notice of hearing scheduling a formal



1 hearing in this case for March 8th, 1999, at 9:00  
2 in this room.  
3 On January 21, 1999, the Commission issued  
4 a revised notice of hearing scheduling the hearing  
5 for this date.

6 On January 25, 1999, Consolidated filed  
7 and offered to reconnect all Western Wireless  
8 cellular customers, but not its wireless  
9 residential customers, referred to as the fixed  
10 wireless.

11 On January 9, 1999, Consolidated filed its  
12 answer and counterclaim. Consolidated admits that  
13 it disconnected inward dialing service to Western  
14 Wireless on January 11, 1999, but states that the  
15 service was reconnected on February 1, 1999.  
16 Consolidated denies that its actions were unlawful  
17 or that it made any unjust or unreasonable  
18 discrimination in connection with the service.

19 Consolidated's counterclaim alleges that  
20 Western Wireless has engaged in competitive local  
21 exchange carrier activities without proper  
22 authority, without complying with the requirements  
23 of North Dakota law relating to certificate of  
24 public convenience and necessity and unnecessary  
25 duplication of exchanges. Consolidated requests

1 that the Commission deny the request of Western  
2 Wireless and to enter a cease and desist order  
3 against Western Wireless.

4 On February 15, 1999, Consolidated filed  
5 its response to motion for preliminary injunctive  
6 relief requesting that the motion of Western  
7 Wireless be dismissed as moot because Consolidated  
8 had restored the direct inward dialing service in  
9 Regent to Western Wireless.

10 On March 3, 1999, Western Wireless filed  
11 its answer and motion to dismiss counterclaim.  
12 Western Wireless in its answer denies that it has  
13 engaged in any activities without proper  
14 authority.

15 Western Wireless moves to dismiss for the  
16 following reasons:

17 1. That it is authorized to provide  
18 wireless residential service over its cellular  
19 licenses issued by the FCC;

20 2. That it is exempt under 47 USC Section  
21 332(c)(3)(a) from state entry and rate regulation  
22 because it is classified as a commercial mobile  
23 radio service; and

24 3. That the FCC has opened a rulemaking  
25 proceeding to address the Western -- to address the

1 wireless residential service matter and has  
2 proposed to establish a rebuttable presumption that  
3 fixed wireless offerings would be regulated as CMRS  
4 offerings, exempt from state entry and rate  
5 regulation.

6 Western Wireless requests that the  
7 Commission dismiss the request of Consolidated for  
8 an order requiring Western Wireless to cease and  
9 desist from providing its wireless residential  
10 service in Regent.

11 That concludes my opening remarks. Before  
12 we proceed, I would like to remind everyone that  
13 the Capitol is a no-smoking area. Also, remember  
14 that we are tape-recording this hearing in addition  
15 to having the court reporter here. Please remember  
16 to speak clearly.

17 I also want to advise everyone that the  
18 Commission has a meeting commitment at noon today  
19 so there will be an extended lunch break. We plan  
20 to recess at about twelve o'clock and hope to be  
21 able to reconvene at about 2:00 p.m.

22 I would also like to introduce the court  
23 reporter at this proceeding, Denise Andahl.

24 I would like to now proceed with the  
25 appearance of parties. First of all, Western

1 Wireless.

2 MR. DEJORDY: My name is Gene DeJordy,  
3 D-e-J-o-r-d-y. I'm in-house counsel for Western  
4 Wireless Corporation. Assisting me at this hearing  
5 is Tom D. Kelsch.

6 MR. BINEK: Thank you. Consolidated.

7 MR. MAUS: Mr. Binek and Commissioners, my  
8 name is Mike Maus. I'm an attorney from  
9 Dickinson. I'm general counsel for Consolidated  
10 Telephone Cooperative. Jan Sebby from Minot is  
11 appearing as co-counsel for Consolidated  
12 Telephone.

13 MR. BINEK: Mr. Johnson.

14 MR. JOHNSON: My name is Chuck Johnson.  
15 I'm an attorney with the Commission representing  
16 the Commission. And with me is Patrick Fahn, our  
17 chief engineer, and Jerry Lein, our second chief  
18 engineer.

19 MR. BINEK: Thank you. Commissioners,  
20 there is an expedited motion for injunctive relief  
21 that was filed by Western Wireless which  
22 Consolidated claims is moot. There's also a motion  
23 by Western Wireless to dismiss Consolidated's  
24 counterclaim. I think that the parties agree that  
25 the -- that the motion for injunctive relief is a